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No. 350

In the Supreme Court of the United States

OCTOBER TERM, 1960

JAMES R. CARTER, JOE S. FLUDD, AND JAMES M. HICKS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is not yet reported (R. 123–126; Pet. App. 21–23).

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1960 (R. 127; Pet. App. 24). On August 1, 1960, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including August 20, 1960, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioners were denied due process by the court's instructions, in the language of the statute, that unexplained possession of lottery paraphernalia was prima facie evidence of their participation in the operation of a lottery.

2. Whether there was probable cause for the arrest and search of the petitioners.

3. Whether the petitioners were prejudiced by the statement of a witness that a co-defendant under the indictment had entered a plea of guilty where the court immediately thereafter instructed the jury that it was not to consider this testimony in any way.

STATUTES INVOLVED

Title 22 D.C. Code § 1501 provides:

> Lotteries—Promotion—Sale or possession of tickets.—If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or trans-

fer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

Title 22 D. C. Code § 1502 (1951 Edition, Supp. VIII) provides:

Possession of lottery or policy tickets.

If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current, used or to be used in violating the provisions of sections 22–1501, 22–1504, or 22–1508, he shall, upon conviction of each such offense, be fined not more than $1,000 or be imprisoned for not more than one year, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof.

Title 22 D.C. Code § 1505 (1951 Edition, Supp. VIII) provides:

Permitting gaming table or device to be set up.—(a) Any house, building, vessel, shed, booth, shelter, vehicle, enclosure, room, lot, or other premises in the District of Columbia, used or to be used in violating the provisions of section 22–1501 or 22–1504, shall be deemed "gambling premises" for the purpose of this section.

(b) It shall be unlawful for any person in the District of Columbia knowingly, as owner, lessee, agent, employee, operator, occupant, or otherwise, to maintain or aid or permit the maintaining of any gambling premises.

* * * * * *

(d) Whoever violates this section shall be imprisoned not more than one year or fined not more than $1,000, or both, unless the violation occurs after he has been convicted of a violation of this section, in which case he may be imprisoned for not more than five years, or fined not more than $2,000, or both.

STATEMENT

A seven-count indictment filed in the United States District Court for the District of Columbia charged the petitioners and two others with violation of District of Columbia lottery laws (R. 7–8). All three petitioners were named in count one as having promoted the numbers game in violation of 22 D.C. Code 1501. In addition, petitioner Carter was charged in count two with maintaining gambling premises (22 D.C. Code 1505) and in count three with possession of lottery tickets (22 D.C. Code 1502), and petitioners Fludd and Hicks in counts

four and six, respectively, with possession of lottery tickets (22 D.C. Code 1502). After a jury trial, the petitioners were found guilty on each of the counts under which they were charged (R. 10).[1] Each was sentenced to imprisonment of from nine months to twenty-seven months on count one, the promotion count. Each was sentenced under the other counts to imprisonment for nine months to run concurrently with the promotion count[2] (R. 11, 12, 13). The court of appeals affirmed (Pet. App. 21–24).

A

THE EVIDENCE

At trial, the government presented evidence of the following facts:

In September, 1958, officers of the District of Columbia Gambling Squad began surveillance of a basement shoe shine parlor-variety store (operated by petitioner Carter (R. 54)), after having received complaints of gambling activities taking place there (R. 18). After several weeks of observation by the police during which gambling paraphernalia and activity were seen; the police obtained a search warrant for the premises and arrest warrants for three individuals not involved in this petition (R. 2–7, 20–25).

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[1] With respect to the other two persons named in the indictment, one Yancey Peterson entered a plea of guilty prior to trial. The other, Phillip Fludd, was acquitted by the jury on one count and two other counts were dismissed (R. 122).

[2] As to petitioner Carter, the nine-month sentence was generally imposed for counts 2 and 3.

On September 26 at 2:30 p.m. Lieutenant Foran, approaching the rear door of the premises with three other policemen, yelled "Police. We have a search warrant for gambling violations" (R. 50). As the officers entered the open rear door (R. 73), petitioner Carter was seen standing at a desk just inside a doorway or "divider" leading to a middle room (R. 57, 74).

A police sergeant executed the search warrant and arrested Mr. Carter (R. 3, 28). From his person the police seized $20.56 in cash (R. 29, 81), a notebook containing numbers bets (R. 29, 58, 59, 61), several numbers "cut cards" (R. 30, 61, 62) and slips of paper bearing numbers bets (R. 30, 61, 62). From the desk near where Mr. Carter was standing, the police recovered a number of coin envelopes bearing writers' codes and amounts of money, a tablet containing number bets recorded in duplicate, and pieces of paper bearing number bets (R. 31, 61, 64). Lottery items were also found in the pocket of a coat on the premises and from trash in the rear room (R. 40, 54).

Upon entering, Lieutenant Foran immediately went through the premises to the front where the business shop was located. There were two officers there who had entered by the front door (R. 51). There were also two other persons. These persons were not arrested (R. 32, 76). Lieutenant Foran instructed the officers not to bother anyone coming in unless such person came to the door leading to the rear of the premises (R. 52). Returning to the rear rooms, the lieutenant closed this door and instructed

the officers there that the door was to remain closed (R. 51–52, 75).

The officers remained in the back rooms approximately an hour (R. 76). During this period of time some eighteen persons, who had entered the premises at varying times, were placed under arrest and searched in the rear rooms (R. 47).

Petitioner Hicks was arrested at 2:40 p.m. when, according to the government's evidence, he entered the rear room from an alley through the rear door (R. 43, 45). From his pocket, the police recovered $23.00 in cash (R. 37, 38, 81) and a large quantity of numbers slips bearing bets (R. 38, 61, 65).

Petitioner Joe Fludd was arrested at 3:05 p.m. when, as government witnesses testified, he entered the rear room through the rear alley door (R. 52, 53, 77). A total of $140.41 was found in his pockets (R. 52–53, 81). On his person also were an address book on which were recorded number bets, a collection list bearing codes and amounts of money and three "cut cards" (R. 53, 61, 67, 71–72). Certain of the codes found on the collection list matched the code designations on some of the number slips found in the trash (R. 53, 71).

Petitioners Hicks and Fludd were the only two persons to enter the premises by the rear door (R. 77).

B

THE MOTION TO SUPPRESS

Prior to trial, a motion to suppress, made by petitioners Fludd and Hicks, was denied.[2] At trial the legality of the search and the arrests was again attacked. The court, granting a hearing out of the presence of the jury, heard testimony from all of the defendants including the following testimony pertinent here:

Petitioner Fludd said he entered the shop from the front entrance to get a coca cola. Once inside, he said, an officer ordered him through a connecting door to the rear where he was searched and items taken from his person (R. 86–88).

Petitioner Hicks said he entered the shop from the front to get a shoe shine, and was taken to the rear where he was searched and items taken from his person (R. 91–92).

Two other persons testified that they entered the shop at times varying between 2:00 and 3:30 that day. One said he came for a drink, the other a shoe shine. Both said they were ushered to the rear and searched. One estimated there were 30 people in the rear room, the other 20 to 25. Both said they were taken to police headquarters, photographed or fingerprinted and then released (R. 93–95).

At the conclusion of the testimony the court denied the motion.

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[2] While this fact does not appear in the record before this Court, reference is made to it in the original trial transcript (Tr. 257). The prior motion and order of denial are on file in the district court.

C

THE INSTRUCTIONS

In its charge to the jury, the court instructed at length as to the presumption of innocence and the burden of the government to prove the defendants guilty beyond a reasonable doubt (R. 107–108). As to the specific charge of operating a lottery, the court instructed (R. 110–111):

> In order to convict on this charge, the law does not require actual proof that the defendant was operating or participating in the operation of a lottery. The law provides as follows:
>
> "The possession of any copy or record of any such chance, certificate, right, or interest, or of any such ticket, certificate, bill, token or device shall be prima facie evidence that the possessor of such copy or record did at the time and place of such possession keep, set up or promote or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting or advertising a policy lottery, policy shop, or lottery."
>
> In other words, if it is shown that a defendant has numbers slips or other records relating to a lottery in his possession, that constitutes evidence that he participated in operating the lottery, unless there is proof to the contrary.
>
> Consequently, the jury has a right to find a verdict of guilty on a charge of operating the lottery from the fact that a person is found in possession of numbers slips or any other records of the lottery, unless the contrary is shown.

At the conclusion of the instructions defense counsel objected, *inter alia*, that the manner of charge with

respect to the prima facie evidence rule had caused a shifting of the burden of proof (R. 113).

After the jury had deliberated for some time, it asked for the District of Columbia Code provisions. Over objection, the court repeated its instructions with respect to the specific charges (R. 118–119). At the request of defense counsel, it repeated its instruction as to burden of proof (R. 120–121).

ARGUMENT

1. The petitioners contend that the court improperly instructed the jury as to the inference to be given the possession of lottery materials in determining guilt of the operation of a lottery under 22 D.C. Code 1501 (pp. 2–3, *supra*). This provision makes such unexplained possession prima facie evidence that the possessor was concerned in promoting a lottery. The instruction complained of was no more than a reading of the statutory language verbatim and a few carefully chosen words of explanation. The court merely restated that a showing that a defendant had such records was evidence and that consequently a jury "has a right" to find a verdict of guilty on such evidence unless the contrary is shown. This explanation gave the presumption only the force and effect that Congress intended. It could not have given the jury, as the petitioners imply, the impression that it must convict. The jury knew that it had the alternative of acquitting on this or any other evidence; it was fully informed as to the presumption of innocence and the burden of the government to prove guilt beyond a reasonable doubt.

Since the court's instruction was a fair restatement of the statutory language, the petitioners' contentions, in effect, amount to an indirect attack on the constitutionality of the statute itself. But statutory presumptions making possession of a prohibited article prima facie evidence of guilt, where there is, as here, a rational connection between the fact proved and the fact permitted to be inferred, have long been upheld by this Court. See *Yee Hem* v. *United States*, 268 U.S. 178. This Court has found it consistent with all constitutional protections to place on an accused the burden of explaining or justifying facts peculiarly within his knowledge. *Casey* v. *United States*, 276 U.S. 413, 418.

In *Maynard* v. *United States*, 215 F. 2d 336 (C.A.D.C.), the statute here in question was considered, against allegations almost identical, and under facts very similar, to those in the instant case. The Court of Appeals for the District of Columbia, citing *Yee Hem*, said (215 F. 2d at 341):[1]

> It is clear to us that the inference permitted by the statute in nowise impinged upon the over-all requirement as the trial judge charged, that the jury must find, on the whole case, that every element of the offense had been established beyond a reasonable doubt. It was within the province of the jury to take into account the permitted inference as it considered its verdict.

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[1] The court also rejected the contention that the same evidence was used to convict on both possession and operation of a lottery noting (215 F. 2d at 340): "Two separate offenses are clearly defined." See also *Davis* v. *United States*, 274 F. 2d 585 (C.A.D.C.).

Here the petitioners were shown to have possession of lottery records on lottery premises. They chose not to explain this possession. They have no cause now for complaint.

2. Petitioners Hicks and Fludd complain that their arrest and the subsequent search of their persons were in violation of their rights under the Fourth Amendment. The facts do not support their position.

There is no question here that the officers were properly on the premises where the arrests took place in the execution of a valid search warrant. The only issue is whether the officers as prudent men had probable cause to believe that the petitioners were, or had been, committing an offense. *Brinegar* v. *United States*, 338 U.S. 160, 175; *Henry* v. *United States*, 361 U.S. 98, 102.

In similar lottery cases arising in the District of Columbia, the court of appeals has held that officers are justified in inferring that all persons present or entering a numbers lottery rendezvous at the time of day when bets are assembled are probably participants in the game. *Wyche* v. *United States*, 193 F. 2d 703, certiorari denied, 342 U.S. 943; *Stephens* v. *United States*, 271 F. 2d 832. The facts of this case do not justify a departure from this inference for, in the light of the circumstances surrounding the arrests of Messrs. Fludd and Hicks, the fact that a licensed public parlor was a "front" for the rendezvous is immaterial.

The testimony of the officers was that these petitioners entered the basement by the rear door. This is in itself significant. Customers on legitimate business do not enter a shop by the rear unless a public entrance is provided there. Moreover it is clear that the officers knew that the illegal lottery activity was centered in the rear rooms just inside the back door. Thus the supervising officer testified that he instructed that no persons coming into the shop were to be apprehended unless they sought to enter the rear. It was in these rooms that the officers had seized gambling paraphernalia just prior to the entrance of Messrs. Hicks and Fludd. It was there that some few days previously at the same time of day one of the officers had observed number slips lying in full view on a desk and a person writing bets thereon (R. 24–25). The rooms were so small that any such activity would of necessity be clearly discernible to anyone passing through this part of the premises. Under these circumstances it was reasonable to infer that any persons entering the rear door at this time of day would in some way be connected with the numbers game. The officers had probable cause for the arrest and subsequent search of the petitioners.

3. The court below properly rejected the petitioners' contention that they were prejudiced at trial by the remark of a government witness that a codefendant had entered a plea of guilty earli[1] in the case.[1] When the statement complained of was

[1] The circumstances surrounding the error complained of are detailed in the opinion of the Court of Appeals (Pet. 22–23).

made, the trial court immediately gave an admonition to the jury to disregard completely what he described as having nothing at all to do with the case. This fact, and the fact that the remark could not have influenced a verdict supported by corroborated and uncontradicted evidence that the petitioners were carrying on their persons lottery paraphernalia, properly formed a basis for the conclusion below that the error was harmless.* See *Delli Paoli* v. *United States*, 352 U.S. 232; *Opper* v. *United States*, 348 U.S. 84; *Hopt* v. *Utah*, 120 U.S. 430. It is significant, as the court below noted, that the jury did not convict all the defendants.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1960.

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*The cases cited by the petitioners are distinguishable as involving situations of compounded or overall prejudice, as for example where the court improperly alluded to guilty pleas of co-defendants or co-conspirators accepted in the presence of the jury, or instructed that the jury might take into consideration such pleas in arriving at a verdict. See *United States* v. *Toner*, 173 F. 2d 140 (C.A. 3); *United States* v. *Hall*, 178 F. 2d 853 (C.A. 2); *Payton* v. *United States*, 222 F. 2d 794 (C.A.D.C.).

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